

Attachment - AFFIRMATIVE DEFENSES

Check any boxes that apply to your case

☐ **Running of the Statute of Limitations**

The plaintiff has a limited amount of time to sue you from the date the incident (they are suing you about) happened. Below are common time limits:

- | | |
|----------------------------|---|
| a. Personal Injury | 2 years from the injury or discovery (if injury in 2003). |
| b. Oral Contract | 2 years from the date the contract is broken. |
| c. Written Contract | 4 years from the date the contract is broken. |
| d. Property Damage | 3 years from when the damage happened. |

For more information, see California Code of Civil Procedure sec. 340.

☐ **Failure to State a Cause of Action**

Every lawsuit must have at least one **cause of action**. A cause of action is a legal theory upon which a lawsuit can be based. Each cause of action has certain parts that must be written in the complaint and proved at trial. If you think the plaintiff has not written any part of their cause or causes of action, you can use this defense.

☐ **Waiver and Estoppel**

These two defenses are closely related. They are based on the concept that if someone "says one thing but does another," he or she may be held to what was first said. If the plaintiff told or promised you something regarding the money you are being sued for, and you relied upon the statement or promise, but plaintiff failed to honor it, these defenses may apply to you.

☐ **Unclean Hands (only used in equity)**

The law requires those coming into the court seeking justice to do justice themselves. This concept is called "clean hands." If you believe the plaintiff has taken advantage of his or her own wrong doing in relation to the lawsuit, you may raise this defense.

☐ **Laches**

The law requires people to act promptly to enforce their rights. If the plaintiff waited a long time to file a lawsuit, without having a good reason for the delay, and the delay has made it harder for you to defend the case, this defense may apply to you.

☐ **Failure to Mitigate Damages**

Plaintiffs should not be able to collect money from you if they could have prevented the damage. For example, if you break a year long lease, a landlord is required to find a new tenant as soon as possible. You may still be responsible for the difference in the rent and the time the unit was not rented. But the landlord cannot just wait out the year and then try and force you to pay the whole year's rent.

☐ **Unjust Enrichment**

You should use this defense if giving the plaintiff the amount they request in the lawsuit would result in the plaintiff receiving more money than he/she is entitled to.

☐ **Prevention of Performance and Act of God**

If you were prevented from doing your part of the contract either by the plaintiff or a natural occurrence (earthquake, flood, storm), these affirmative defenses may apply to you.

☐ **Discharge by Bankruptcy**

If you filed bankruptcy, and the claim you are being sued for was included in your bankruptcy, you may have been released from paying the claim when your bankruptcy case was over. Check with your bankruptcy attorney to find out if the plaintiff's claim was "discharged" or released by the bankruptcy court. Include the bankruptcy case information including the date of discharge and the case number.

Case Name: _____

Case # : _____

☐ **Failure to Exhaust Administrative Remedies**

You may use this defense if the plaintiff was supposed to pursue different administrative avenues that they failed to do before suing you. This defense is most commonly used by government agencies or businesses.

☐ **Failure to Pursue ADR**

You may use this defense if the person suing you failed to request ADR as they were required. If you think this is an affirmative defense, you may want to file a petition for ADR.

☐ **Lack of Privity**

There was no contract or agreement between you and the person suing you and the debt was not properly transferred to the person suing you.

☐ **Statute of Frauds**

The "Statute of Frauds" law requires many different types of contracts be in writing. There are some exceptions to the Statute of Frauds, but if you think the claim the plaintiff is suing you for arose out of an agreement not in writing, that should've been in writing, this defense may apply to you.

☐ **Parole Evidence Rule**

The law states that when people put their agreements in writing, the written contract takes priority over whatever else is said in relation to the agreement. If the plaintiff's claims are based on a verbal statement that contradicts, or falls outside the written terms of the agreement, you may raise this defense.

☐ **Frustration of Purpose**

Enforcement of the actual contract would go against the purpose of the agreement you made with the person suing you in the first place.

☐ **Failure of Condition Precedent**

Sometimes one party's performance of a contract is dependant on the other party first performing his or her obligations. If the plaintiff was required to do certain things before you had to do other things under the contract, and the plaintiff failed to do his or her job, you may raise this defense.

☐ **Breach by Plaintiff**

The person suing you broke their end of the end of the contract first, so you were excused from performing your part.

☐ **Anticipatory Repudiation**

The person suing you pulled out of the contract before you had a chance to perform your part of the contract.

☐ **Attorney's Fees Not Recoverable**

The law only allows the winning side in a lawsuit to be reimbursed the money they paid for attorney's fees if the contract upon which the lawsuit is based says that the winning side can recover attorney's fees, or a **statute** (law) says the winning side can recover attorney's fees. If the plaintiff has asked for reimbursement of attorney's fees but there is no contract provision or law that entitles plaintiff to recover attorney's fees, you can raise this defense.

☐ **Improper Notice of Breach**

You may use this defense if the plaintiff did not tell you that you broke the contract before filing the lawsuit. In this defense, notice must be required and the failure of the other side to give notice must have deprived you of your opportunity to fix the problem.

☐ **Offset**

You may use this defense if the plaintiff owes you money.

☐ **Usury**

You may use this defense if the plaintiff is charging higher interest than the law allows.

Case Name: _____

Case # : _____

☐ **Accord and Satisfaction**

You may use this defense if you and the plaintiff agreed to settle the claim for a lower amount than the lawsuit is asking for and you have paid the lower amount.

CONTRACT FOR SERVICES ONLY

☐ **Failure of Consideration**

You may use this defense if the person suing you never performed the services that they are suing you for.

☐ **Lack of Consideration**

The services provided by the person suing you are so poor that any further payment to them would be unreasonable and unfair.

☐ **Breach of Express Warranty**

This defense applies if the person suing you failed to honor a promised or written warranty for services.

☐ **Breach of Implied Warranty**

The services provided by the person suing you fail to meet the custom and standard within the industry.

CONTRACT FOR GOODS ("Things") ONLY

☐ **Failure of Consideration**

You may use this defense if the goods or products you bought from the person suing you are completely defective.

☐ **Lack of Consideration**

If the goods you purchased are so defective that the enforcement of the contract would be unreasonable.

☐ **Breach of Express Warranty**

This defense applies if the goods you purchased were defective, you requested their repair within the written or promised warranty period and the plaintiff failed to make the repair.

☐ **Breach of Implied Warranty**

The goods purchased from the person suing you could not be used for the purpose for which they were sold. You tried to return the goods but the person refused to accept them.

☐ **No Deficiency Judgment Permitted by Law**

The complaint is asking for money after the goods or property that served as collateral on a loan was sold. Plaintiff, or the person or entity that transferred the claim to plaintiff, is not entitled to sue for extra money after the sale of the goods or property either because the law does not allow for a deficiency judgment, or because there was improper notice of sale.

☐ **Failure to Act in a Commercially Reasonable Manner**

The person who is suing you failed to follow the procedures required by the California Commercial Code in the sale of goods.

CONTRACT BASED ON LOANING MONEY

☐ **Contract Void as Against Public Policy**

Money loaned by person suing you was given in violation of the law. Allowing the person to recover the money would be awarding illegal conduct.